

**COMMONWEALTH OF MASSACHUSETTS
DIVISION OF ADMINISTRATIVE LAW APPEALS
BUREAU OF SPECIAL EDUCATION APPEALS**

In Re: Dorian¹

BSEA #1702306

RULING ON WALTHAM PUBLIC SCHOOLS' MOTION TO DISMISS, WALTHAM PUBLIC SCHOOLS' MOTION FOR RULINGS AND SANCTIONS, PARENT'S CROSS MOTION FOR SANCTIONS AND MOTION TO COMPEL, AND PARENT'S MOTION TO ENTER PROTECTIVE ORDERS

This matter comes before the Hearing Officer on several motions filed by each party. Waltham Public Schools ("the District") filed a Motion to Dismiss Parent and Student's² *Hearing Request* on July 31, 2017³ and a Motion for Rulings and Sanctions on August 15, 2017. Parent filed a Cross-Motion for Sanctions and Motion to Compel, as well as a Motion to Enter Protective Orders on or about August 24, 2017.⁴ I address these motions together because they implicate, and require examination of, similar issues. At the core of the present dispute is Parent's ongoing denial that many documents requested by the District through discovery are in her position, and her failure to abide by multiple Orders regarding discovery issued by the undersigned Hearing Officer.

For the reasons below, the District's Motion to Dismiss is hereby **DENIED**. The District's Motion for Rulings and Sanctions is **ALLOWED in part and DENIED in part**. Parent's Cross-Motion for Sanctions and Motion to Compel is **DENIED**. Parent's Motion to Enter Protective Orders is **ALLOWED in part and DENIED in part**.

I. PROCEDURAL HISTORY

The factual background and procedural history of this matter, which began when Parent filed a *Hearing Request* against Waltham Public Schools on September 20, 2016, is detailed in my Ruling on Parent's Motion to Quash and Vacate Subpoenas and Waltham Public Schools' Motion to Compel, issued on July 20, 2017. As such, I incorporate that Ruling here and summarize briefly the most relevant information for the time period from September 20, 2016 to July 20, 2017.

A. Postponements and Discovery Disputes: September 2016 Through July 2017

¹"Dorian" is a pseudonym chosen by the Hearing Officer to protect the privacy of the Student in documents available to the public.

²Although documents filed by the parties refer to Parent, Student, or Parent and Student, for ease of reference, I will use "Parent" to refer to the claimants throughout this Ruling.

³Waltham Public Schools ("the District") filed a supplemental memorandum to its Motion to Dismiss on August 14, 2017, and on August 22, 2017 it filed a Renewed Motion to Dismiss.

⁴Parent filed by facsimile (fax) a document dated August 21, 2017 consisting of multiple blank pages, on August 22, 2017. On August 24, 2017, she filed what may still be an incomplete version of the document.

On October 17, 2016, Waltham served Parent with its First Set of Requests for Production of Documents and Interrogatories and on the same day, the undersigned Hearing Officer granted the District's request to postpone the Hearing initially scheduled for November 1, 2016 to allow the parties to address issues central to their dispute and explore informal resolution. On November 18, 2016, Parent filed her Response to the District's First Request for Production of Documents and Interrogatories. She provided written responses to the District's requests but did not produce any of the requested documents, instead denying her possession as to some requested documents and invoking privilege and confidentiality protections as to the other documents requested by the District. A Conference Call was held on the same day, during which the parties agreed to a Pre-Hearing Conference to be held on December 21, 2016.

On December 2, 2016, the District filed its first Motion to Compel Parent's Discovery Responses (Motion to Compel). Before the undersigned Hearing Officer issued a ruling on the District's Motion to Compel, the parties requested a continuance and agreed to provide the Hearing Officer with status reports by January 20, 2017. The District's Motion to Compel was stayed at the parties' request. Following a Conference Call on February 3, 2017, with the parties at an impasse, the Hearing Officer ordered both parties to furnish exhibits and witness lists in advance of a Hearing scheduled for May 10 and 11, 2017. Parent was directed to file a status report by March 3, 2017 clarifying requested relief. On March 31, 2017, she filed an Amended Hearing Request.

On April 3, 2017, the Hearing Officer issued an Order granting the District's Motion to Compel. Parent was directed to file answers to interrogatories and produce documents responsive to the District's discovery requests on or before April 7, 2017. Parent subsequently requested an extension of this deadline to April 10, 2017, which the Hearing Officer granted. However, Parent did not meet the amended discovery deadline and did not file her answers to interrogatories and responses until April 27, 2017, submitting to the District a fraction of the documents it expected to receive. On April 26, 2017, per the parties' joint request, the Hearing was continued to May 24, 2017 to allow for the completion of discovery and the parties were directed to submit to the Bureau of Special Education Appeals (BSEA) mutually agreeable hearing dates before then.

On May 4, 2017, the District served subpoenas *duces tecum* upon five different third parties seeking documents related to the litigation.⁵ On May 15, 2017, Parent filed a Motion to Quash and Vacate the District's Subpoenas (Motion to Quash), to which Waltham filed its objection on May 22, 2017. Pursuant to the joint request of the parties, the Hearing Officer continued the matter again, this time to June 22, 2017, to allow for the completion of discovery. On May 26, 2017, the District submitted a Second Motion to Compel Discovery Responses asserting that Parent had not fully responded to its first Motion to Compel and had therefore failed to comply with the BSEA's April 3, 2017 Order.

The Parties and the Hearing Officer participated in a Conference Call to discuss pending discovery motions on June 12, 2017. On that date, the parties agreed to hearing dates of August 14, 15, and 28, 2017. During the call, the Hearing Officer ordered that Parent produce all documents responsive to the District's Document Request No. 3 by June 21, 2017. Having yet to

⁵ Bureau of Special Education Appeals *Hearing Rule VIII(B)* allows a party in a BSEA proceeding to serve a subpoena *duces tecum* on a nonparty requesting that documents be produced to the office of the requesting party prior to the hearing.

receive any written response to its Second Motion to Compel, the District filed a Third Motion to Compel Discovery Responses on July 6, 2017, again alleging Parent's violation of BSEA *Hearing Rule VI(B)*. Parent did not respond to the District's Second or Third Motions to Compel, which I refer to together as the District's Second Motion to Compel.

On July 20, 2017 the undersigned Hearing Officer issued a Ruling allowing Parent's Motion to Quash in part and denying it in part; allowing the District's Second Motion to Compel Discovery, with certain conditions, and allowing the District's request for an Order precluding Parent from submitting documents at hearing not previously produced to the District and any witness testimony pertaining to those documents ("July 20th Ruling"). This Ruling denied Parent's Motion to Quash, with the exception of certain materials in the possession of her advocate. As to these materials, Parent was directed to file a Motion for a Protective Order by close of business on July 27, 2017 establishing that those materials were protected from discovery by the work product privilege. Parent was instructed to identify, in her Motion for a Protective Order, each document she intended to withhold and show that each identified document was prepared (1) by her advocate and (2) in anticipation of litigation and not for the broader purpose of her work with the family to secure an alternate placement for Dorian. The Ruling also allowed the District's Motion to Compel as to all of its discovery requests, with the exception delineated above; Parent was permitted to withhold from discovery only those documents she could establish were entitled to the work product privilege, and as to those documents she was instructed to file a Protective Order within seven (7) days of the issuance of the Ruling. As to the remainder of requested discovery, Parent was directed to submit her responses to the District's Requests for Production of Documents and Interrogatories no later than close of business on July 27, 2017.

Parent failed to submit responses to the District's discovery requests by close of business on July 27, 2017. She did not request an extension of the deadline, though it appears that she submitted some documents to the District on August 7, 2017. Parent did not file a Motion for a Protective Order by close of business on July 27, 2017, nor did she request an extension of the deadline. In fact, Parent filed no response to the July 20th Ruling and Order until August 24, 2017.

B. Present Motions

1. The District's Motion to Dismiss

On July 31, 2017, the District filed a Motion to Dismiss the parent's and student's claims without prejudice, accompanied by a supplemental memorandum (filed August 14, 2017) on the grounds that Parent and Student had failed to prosecute and proceed with the case, and had repeatedly failed to comply with the BSEA Hearing Rules and the Hearing Officer's Orders. In the alternative, the District requested postponement of the Hearing in order to pursue enforcement of its subpoenas in the District Court, as it had not received responsive documents and interrogatory answers the parent and student had been ordered to submit and as a result, had been unable to prepare its defense.

Following a Conference Call on August 4, 2017, the District's postponement request was allowed over Parent's objection due to Parent's continuing discovery violations, including her disregard of BSEA Orders. Parent's advocate stated that she had not received the Hearing Officer's Ruling of July 20, 2017 (though she acknowledged that she had heard of it when her client received it, allegedly on August 1, 2017), and she also stated that she had not received the District's Motion to Dismiss.⁶ The District disputed these representations in a letter it sent to Parent's advocate and the BSEA on August 14, 2017.

During a telephonic Motion Session held on August 14, 2017, the District argued that Parent had failed to prosecute her case and comply with BSEA Hearing Rules and Orders, including an April 3, 2017 written Order, a June 12, 2017 verbal Order, and a July 20, 2017 Ruling. The District asserted that Parent's failure to file for protective orders, or to file any response at all, amounted to a waiver of any objections. The District also noted that the documents provided by Parent on August 7, 2017 were limited to those it had already received. As a consequence of Parent's refusal to comply with discovery rules and orders, the District contended, it was severely prejudiced in its ability to prepare a defense to Parent's claims. These violations, it argued, warranted dismissal of Parent's case without prejudice or, in the alternative, a number of sanctions.

In response, Parent's advocate represented that she had provided all requested discovery in June, 2017; that the student had signed waivers giving the District access to information requested from the private school at which he had been unilaterally placed, but the District had refused to procure that information; and that she had been out of town during the month of July.

In an abundance of caution, the undersigned Hearing Officer asked that the District file a written Motion for Sanctions outlining the sanctions it proposed, which would be due August 14, 2017, and directed Parent to respond to the District's Motion within seven (7) days, by August 21, 2017. A Ruling on the District's Motion to Dismiss was deferred so that both Motions could be considered together.

2. The District's Motion for Rulings and Sanctions

After close of business on August 14, 2017,⁷ the District filed a Motion for Rulings and Sanctions ("Motion for Sanctions"). Waltham asserted that because Parent had failed to file a motion for a protective order in accordance with the undersigned Hearing Officer's July 20th Ruling, the Hearing Officer should reconsider, and reverse, that Ruling insofar as it allowed in part Parent's Motion to Quash the subpoena served by the District upon Parent's advocate. The District also argued that because Parent failed to file notification of objections or move for a protective order in response to its initial discovery requests, filed October 17, 2016,⁸ and failed to

⁶ Fax confirmations suggest otherwise.

⁷ Because the District's Motion for Rulings and Sanctions was sent to the Bureau of Special Education Appeals by facsimile after the close of business on August 14, 2017, it was filed on August 15, 2017.

⁸ The District noted that Parent failed to produce a single document in response to its first request for production of documents, and characterized Parent's initial response to its interrogatories as follows: ". . . the parent failed to fully answer the District's questions. In her written answers, the Parent either completely avoided the subject matter of the question, failed to provide requested detailed information, denied that requested information was known to her, submitted statements which were vague or unintelligible, and/or asserted that the information requested was 'privileged under confidentiality agreements.' The Parent failed to cite any specific privilege or confidentiality law."

move for a protective order, that the Hearing Officer should allow in full the District's Second Motion to Compel insofar as it pertains to the District's First Request for Production of Documents numbers 4, 6, and 7. In addition, the District moved for the issuance of sanctions against Parent for failure to obey orders to provide or permit discovery. Specifically, it requested that Parent be precluded from adducing any documents and evidence at hearing not produced to the District which are responsive to the District's discovery requests, including any witness testimony pertaining to these documents.

3. *Parent's Response*

During the early morning hours of August 22, 2017⁹ Parent, through her advocate, filed Plaintiff's Response to District's Motion for Sanctions. In it she argued that both Parent¹⁰ and her advocate had "complied to the best of their ability with all requests from the District;" that all available information had been produced June 19, 2017; and that the District sought items and documents not in existence. Parent also asserted that a memorandum was "forthcoming, with an additional copy of all documents requested in the second discovery set, along with the other documentation that outlines all information sent to the District during the 2016-2017 school year as requested through the various motions and discussed once more August 14, 2017." Parent requested that "no sanctions are issued regarding protecting the rights of advocates work-product and client privilege," and sought "sanctions to be placed on the District, specifically denying their ability to delay proceedings by seeking subpoenas for any party that cares for the student." She suggested that the District was using subpoenas to delay the hearing and harass Dorian's providers, and requested "a sanction that no subpoena delay be granted for any party to which the District has ever received a waiver for consent of information from the Student or his Parent." Furthermore, Parent raised "HIPPA rights" and asked that the District "should be ordered to specify exactly what documents and/or information they believe is being withheld and by which person and/or provider that is causing the delay, and inhibiting the District's ability to prepare its defense."

Although Parent's response referred to an "attached memorandum in support of this response," the certificate of service was followed by eleven (11) blank pages. After BSEA administrative assistants left several voicemail messages on Parent's advocate's voicemail, a longer document that included Student's Cross Motion for Sanctions and Motion to Compel, and Student's Memorandum in Opposition of District's motion for Sanctions and Motion to Enter Protective Order was filed by fax on August 24, 2017. It still appears to be incomplete. Although most of Parent's response was untimely filed, I consider and address it below.

4. *The District's Renewed Motion to Dismiss*

On August 22, 2017, the District filed a Renewed Motion to Dismiss, reiterating its

⁹Parent's facsimile appears to have been received by the BSEA sometime after midnight and as such was filed on August 22, 2017.

¹⁰The advocate refers to claimants as "Student" or "Parent and Student," but for consistency I refer to them as Parent.

earlier arguments and adding that Parent's failure to file a timely objection to its Motion to Dismiss constituted a waiver of its right to challenge the District's motion and it should thereby be deemed unopposed. Furthermore, it argued, Parent's failure to submit her response to the District's Motion for Sanctions by August 21, 2017, constituted yet another violation of a BSEA Order, demonstrating Parent's "chronic and contemptuous disregard for" obligations under the BSEA Hearing Rules and the Hearing Officer's Orders. The District requested a Hearing on its Renewed Motion to Dismiss.

5. *Further Responses by the District*

On August 25, 2017, the District sent a letter to the BSEA indicating that it intended to file a response by September 1, 2017 to Parent's motions and objections (specifically, Parent's Response to District's Motion for Sanctions, Parent's Cross Motion for Sanctions and Motion to Compel, Parent's "Memorandum in Opposition of District's Motion for Sanctions," Parent's Motion to Enter Protective Orders, and a Letter to the BSEA from Parent and Student.¹¹ With the exception of Parent's Cross Motion for Sanctions, Motion to Compel, and Motion for Protective Orders, none of these documents requires a response from the District. As to the first two, as explained below, the District prevails and as such there is no need to delay this ruling until after September 1, 2017. As to the Protective Orders, the District addressed these in its previous filings. To the extent the District believes it may be prejudiced by the issuance of the instant Ruling in advance of its response, it may timely file for reconsideration of this Ruling insofar as it grants Parent's Motion to Enter Protective Orders.

II. **DISCUSSION**

The basis of the District's Motion to Dismiss is twofold: Parent has failed to prosecute and proceed with her case, and she has repeatedly failed to comply with the BSEA Hearing Rules and the Hearing Officer's Orders, severely prejudicing the District's ability to prepare its defense of her claims. The second contention serves as the basis of the District's Motion for Sanctions as well. I examine each in turn.

A. **Failure to Prosecute**

BSEA Hearing Rule X(F) permits dismissal of a matter, with or without prejudice, through a ten (10) day Order to Show Cause "[i]f a party fails to file documents required by statute or regulation, to respond to notices or correspondence, to comply with orders of the Hearing Officer, to appear at the scheduled hearing or otherwise indicates an intention not to continue with prosecution of the claim."

In support of its argument that Parent has failed to prosecute her case, the District asserts that it has made "multiple efforts to engage and work cooperatively with Parent's and Student's advocate without success, most recently via correspondence of July 5, 2017, for which their advocate failed to respond." Pointing to Parent's repeated noncompliance with BSEA *Hearing Rule* VI(B) and the Hearing Officer's Orders regarding discovery, Waltham argues that Parent

¹¹ The Letter dated June 19, 2017, purportedly sent to the BSEA by Parent and Student advocate, was never received. It has not been, and will not be, considered by the undersigned Hearing Officer.

has “failed to prosecute and proceed with its case, which is evidenced by [her] lack of activity at the Bureau” as well as her “failure to respond to the District as to numerous pre-hearing discovery issues.”

Although Parent, through her advocate, has neglected to file responses to several of the District’s discovery requests and failed to file timely requests for protective orders, as detailed below, she has not failed to file documents at the BSEA required by statute or regulation, nor has she failed to respond to notices or correspondence generated by the BSEA. She has made herself available for Conference Calls, including telephonic Motion Hearings, and has not indicated any intention not to continue with prosecution of the claim. As such, the only basis for dismissal of her case due to failure to prosecute is her failure to comply with orders of the Hearing Officer pertaining to discovery. Those failures are detailed below.

B. Discovery Violations

BSEA *Hearing Rule* VI governs discovery in the context of BSEA hearings. Pursuant to the Rule, discovery requests may occur in the form of interrogatories, written requests for records, or depositions.¹² The party upon whom a discovery request is served is given a period of thirty (30) calendar days to respond, unless a shorter or longer period of time is established by the Hearing Officer.¹³ That party may, “within ten (10) calendar days of service of the request, file with the Hearing Officer objections to the request or move for a protective order.”¹⁴ The BSEA Hearing Rules demonstrate a preference for informal resolution of discovery disputes, but provide for the issuance of orders by hearing officers where necessary and appropriate.¹⁵

In its Motions to Dismiss and for Sanctions, Waltham Public Schools detailed Parent’s continued failure to comply with discovery obligations, including the following:

1. Parent failed to produce documents in response to the District’s initial discovery requests, which were served on her on or about October 17, 2016.
2. Parent failed to file notification of objections or move for a protective order with respect to these discovery requests.
3. Parent’s answers to interrogatories were incomplete and asserted privileges without explaining why or how they applied.
4. Parent failed to comply with the Hearing Officer’s written order granting the District’s first Motion to Compel, issued on April 3, 2017. Parent submitted some documents after the deadline had passed, and continued to refuse to produce other relevant documents.

¹² BSEA *Hearing Rule* VI(B).

¹³ *Id.*

¹⁴ BSEA *Hearing Rule* VI(C).

¹⁵ See *id.*

5. Parent failed to submit documents and interrogatory answers in response to the District's second set of discovery requests, which were served on her May 22, 2017.¹⁶

6. During a Conference Call on the District's Second Motion to Compel, Parent, through her advocate, acknowledged that she is in possession of several documents responsive to the District's requests for production. Although Parent was ordered to produce these documents, she never did so.

7. Though she was directed, by way of the July 20th Ruling, to produce responsive documents and to move, within one week, for a protective order as to any documents she believed were protected work product, Parent did neither.

8. As of August 14, 2017, Parent had failed to comply fully with the District's first and second set of discovery requests in violation of BSEA *Hearing Rule VI(B)*¹⁷ and the Hearing Officer's Orders of April 3, 2017, June 12, 2017, and July 20, 2017.

According to the representations she made, through her advocate, during multiple conference calls and in her Response to District's Motion for Sanctions, Parent has "complied with all orders received from the Hearing Officer and [has] complied to the best of [her] ability with all requests from the District." Parent asserts that the District appears to be "hoping to expose something or find something that the Student is 'hiding' that has yet to be disclosed," as it seeks to discover items and documentations not in existence.¹⁸ She argues that the District is attempting to delay proceedings by pursuing enforcement of its subpoenas of Dorian's providers and requests, as she did during a Conference Call, that the District "be ordered to specify exactly what documents and/or information they believe is being withheld and by which person and/or provider that is causing the delay, and inhibiting the District's ability to prepare its defense."

C. Sanctions

As discussed above, the District has requested a range of consequences for Parent's failure to comply with discovery rules and orders: dismissal of the matter without prejudice; the

¹⁶Parent filed an amended Hearing Request on March 31, 2017, following unilateral placement of Dorian at Fryeburg Academy. The District's second set of discovery requests sought documentation and information relating to this placement.

¹⁷BSEA *Hearing Rule VI(B)* directs a party upon whom a discovery request is served to respond within a period of thirty (30) calendar days unless a shorter or longer period of time is established by the Hearing Officer.

¹⁸For example, Parent's advocate contends that she does not communicate in writing with her client or with Dorian and, as such, has no records responsive to Parent's subpoena of this material.

reversal of any discovery rulings against it; and a prohibition on the introduction of evidence by Parent. Where a party's Motion to Compel has been granted and the other party fails, without good cause, to obey that order to provide or permit discovery, the Massachusetts Standard Rules of Adjudicatory Practice and Procedure permit a Hearing Officer to exercise discretion in imposing sanctions. In these circumstances, "the Presiding Officer before whom the action is pending may make orders in regard to the failure as are just, including . . . (2) An order refusing to allow the disobedient Party to support or oppose designated claims or defenses, or prohibiting him or her from introducing evidence on designated matters."¹⁹

In considering the imposition of sanctions in this matter, I bear in mind Parent's assertion that she has complied with the District's discovery requests and that, in fact, the information sought by the District does not exist. I also consider Parent's failure to respond to my July 20th Ruling until at least twenty-three (23) days after she became aware of it, by her advocate's own admission.

1. *Dismissal is not appropriate.*

Although a matter may be dismissed by the BSEA due to, *inter alia*, a party's failure to comply with a Hearing Officer's orders, the placement of this provision within a rule permitting dismissal without prejudice for failure to prosecute – and the requirement that an *Order to Show Cause* be issued first – suggests that this severe sanction is not appropriate where a party flouts deadlines relating to discovery. In this matter, Parent contends that she has provided the discovery to which the District is entitled. Although she has failed to comply with the Hearing Officer's orders on a timely basis (i.e. filing her motion for a protective order almost one month after it was due), her actions indicate a lack of respect for deadlines – and perhaps for the process – but not a lack of intention to prosecute this case. As such, I conclude that dismissal is not an appropriate sanction.

As the District's Renewed Motion to Dismiss, filed August 24, 2017, reiterates the arguments it made in its initial Motion to Dismiss, supplemented by additional examples of Parent's noncompliance, I find it unnecessary to wait for Parent's response or hold a Hearing on the motion. The District's Motion to Dismiss and its Renewed Motion to Dismiss are hereby DENIED for the reasons above.

2. *Reversal of Rulings is not appropriate.*

Waltham Public Schools contends that Parent's failure to comply with both BSEA Hearing Rules and the Hearing Officer's Orders, including her failure to file for protective orders regarding any work product her advocate had prepared in anticipation of litigation, constitutes a waiver of any protection that exists and as such, the Hearing Officer should order Parent to produce all documents responsive to its discovery requests, including those that might be otherwise undiscoverable. Specifically, the District requests a ruling denying in whole Parent's Motion to Quash and Vacate the District's Subpoenas served upon Parent's advocate for failure to timely file a motion for a protective order in accordance with the July 20th Ruling. The District also requests a ruling allowing in whole the District's Second Motion to Compel as it pertains to

¹⁹ 801 CMR 1.01(8)(i)(2).

the District's First Request for Production of Documents numbers 4, 6, and 7, on the same grounds.

Parent addressed this issue in her "Memorandum in Opposition of District's Motion for Sanctions and Motion to Enter Protective Orders" ("Memorandum") Although the document was dated August 21, 2017, it was not filed in whole at the BSEA until August 24, 2017, three (3) days beyond the deadline for her response to the District's Motion for Sanctions established during the August 14, 2017 Conference Call and almost one month after the deadline established in the July 20th Ruling to file for protective orders. It seems that the advocate in this matter, Julliana Jennings, was away from her office at the time the July 20th Ruling was delivered by fax and certified mail. Her failure to obtain coverage of her cases does not excuse her lack of compliance with the Order, under which she was to file a motion for a protective order within seven (7) days of receiving the Ruling.

At the same time, the July 20th Ruling reflects careful consideration of competing concerns, balancing the need for discovery against policy goals underlying Mass. R. Civ. P. 26(b)(3) and the corresponding Federal Rule of Civil Procedure, which set forth protection of materials prepared in anticipation of litigation. As I explained in that ruling, to exclude advocates from this protection "could have a chilling effect on communication among parents, their experts, and advocates; and hamper advocates' ability communicate in writing with their clients and maintain records of their work."

As such, given the importance of work product protections, I decline to reverse these rulings. The District's requests for a ruling denying in whole Parent's Motion to Quash and allowing in whole the District's Second Motion to Compel, are hereby DENIED. Below, I address the untimely arguments Parent made, through her advocate.

In her Memorandum, Parent argues that the requested documents and information are protected by work product doctrine from discovery and subpoena. She states both that "there are no specific documents provided that are being withheld," and that:

[t]he information and work product being withheld consists of handwritten notes from meetings with the Plaintiff, notes and comparisons on the Student and other cases, notes and comparisons to gain a better understanding on [*sic*] the District's programs as it relates to litigations [*sic*], handwritten notes documentation [*sic*] of mental impressions, conclusion, opinion, legal theories, other items written by the Student's advocate to to [*sic*] better prepare and understand how to best litigate ensure [*sic*] the Student is working toward the best steps possible are [*sic*] given the current circumstance in the midst of litigation.

Parent's representation, through her advocate, is self-contradictory and difficult to comprehend. It cannot be true both that no documents are being withheld, and that documents as described are being withheld. Moreover, Parent, through her advocate, provided "a categorical log with respect the nature of the withheld work product and communications." A review of this Work Product and Communication Log reveals that Parent, through her advocate, has withheld information beyond the scope of work product protections.

It appears that Parent withheld from discovery at least three hundred twenty-five (325)²⁰ emails sent by Parent to her advocate between August 1, 2016 and August 19, 2017. As grounds for withholding these documents, Parent asserts that they are protected by “attorney-client privilege; attorney work product.” Moreover she argues in her Memorandum that “[a]ll communications between the Parent, Student and Advocate also should be protected by privilege, given the relationship, and need for uninhibited discourse to enhance the quality services provided, from discovery and subpoena.”

In my July 20th Ruling, I gave serious consideration to the application of work product protections and attorney-client privilege to situations where students and/or parents are represented by non-attorney advocates. I examined the language of Massachusetts and federal rules and determined that attorney-client privilege does not apply. Rather than file a Motion for Reconsideration of this ruling, Parent, through her advocate, restates and supplements the arguments she made in her Motion to Quash. My July 20th Ruling as to the irrelevance of attorney-client privilege in matters involving a non-attorney advocate stands.

Upon consideration of the arguments made by the parties, in addition to the “Work Product and Communication Log” submitted by Parent, I conclude that there is no basis for Parent to withhold from discovery the 325 (or 415) emails sent by Parent to her Advocate. These communications must be provided to the District within five (5) business days of the receipt of the date of this Ruling. The handwritten notes and impressions created by the advocate and documented in the log, on the other hand, are protected work product and as such need not be turned over to the District.²¹

3. *Parent is Prohibited From Relying On Any Evidence Not Produced In Accordance With BSEA Hearing Rules IX(A) and X(C)(1).*

The District also requested that Parent be precluded from adducing any documents and evidence at hearing not produced to the District which are responsive to its first or second set of discovery requests, including any witness testimony pertaining to those documents.

Although the BSEA Hearing Rules outline expectations for ongoing discovery – the party upon whom a request is served is given thirty (30) calendar days to respond; objections to discovery requests and requests for protective orders must be filed within ten (10) calendar days of receipt of the discovery requests – they also provide for what is commonly referred to as the “Five Day Rule.” Under this Rule, “[c]opies of all documents to be introduced (exhibits) and a list of the witnesses to be called at the hearing must be received by the opposing party(ies) and the Hearing Officer at least five (5) business days prior to the hearing unless otherwise allowed by the Hearing Officer.”²² Furthermore, *Hearing Rule X(C)(1)* permits parties to “offer as evidence documents they have exchanged prior to hearing in accordance with these rules,” suggesting that as long as a document is provided to the opposing party in accordance with the “Five Day Rule” (as potentially modified by the Hearing Officer), it may be offered into

²⁰In one column, Julliana Jennings’ Work Product and Communication Log submitted by Parent states that three hundred twenty-five (325) documents were withheld, but the next column states four hundred fifteen (415) “documents withheld, including families.” [sic]

²¹Parent, through her advocate, appears to have labeled these documents “attorney work product.” As she is not an attorney, this label is inaccurate.

²²BSEA *Hearing Rule IX(A)*.

evidence. Moreover, the same rule allows a Hearing Officer to “permit or request the introduction of additional documentary evidence where no prejudice would result to either party.” Read together, these rules anticipate the exercise of discretion by hearing officers in the conduct of hearings.

Given ongoing discovery disputes in the instant matter, and accusations by both sides about improper use of, or noncompliance with, discovery requests, I am exercising my discretion to modify the “Five Day Rule.” All documents that either party intends to introduce into evidence will be due to both the opposing party and the BSEA fifteen (15), rather than five (5), business days in advance of the hearing. Any documents that are not produced in accordance with this Order, and any testimony pertaining to these documents, will be excluded from consideration unless I find that no prejudice would result to either party from admitting those documents into evidence.

Moreover should Parent submit into evidence at the prescribed time documents responsive to the District’s discovery requests that were previously withheld improperly, I will entertain arguments as to whether their admission would prejudice the District.

Therefore, insofar as it bars Parent from introducing into evidence documents responsive to the District’s first and second sets of discovery requests not produced to the District at least fifteen (15) business days in advance of the Hearing and witness testimony pertaining to those documents, the District’s Motion for Sanctions is hereby ALLOWED.

4. *Parent’s Motions*

On August 24, 2017, Parent filed a Cross Motion for Sanctions and Motion to Compel, as well as a “Memorandum in Opposition of District’s Motion for Sanctions and Motion to Enter Protective Order.” Although none of these responses was timely, I address them in turn.

a. Cross Motion for Sanctions and Motion to Compel

Parent filed her “Cross Motion for Sanctions and a Motion to Compel the District on the grounds that the District is creating motions out of frivolity and as a means of communicating with the Student and blocking Student’s academic progress.” She stated that despite her request on February 6, 2017 (and several times since then), the District sent only unofficial records to Fryeburg Academy (where Dorian has been placed unilaterally) and demonstrated an “outright refusal to send any sign [*sic*] sealed copies of transcripts and non-electronic records to the Student, parent, and School.” Moreover the District has refused to sign and return an “MPA Transfer Waiver Form” to permit Dorian to participate in extracurricular activities at his new school. Parent requested that the BSEA compel Waltham Public Schools to send “full and complete Official, Signed and Sealed, School Records” and “a fully executed MPA Transfer Waiver” to Fryeburg Academy and his Parent.

Although Parent may be entitled to these materials under provisions of Massachusetts law, enforcement of these laws is beyond the jurisdiction of the BSEA.

Although styled as a request for sanctions, Parent's motion also appears to serve as an appeal, or request for reconsideration of, the undersigned Hearing Officer's July 20th Ruling insofar as it denied Parent's Motion to Quash and Vacate subpoenas served by the District on Riverside Community Center and Jamie Albert, Dr. Joseph B. Leader at Woburn Pediatrics, and Newton-Wellesley Hospital. As grounds for this Motion, Parent contends that she never denied the District access to or information from, providers. She characterizes the subpoenas as "seemingly an act by the District to delay and drain the Student so that he fulfills the negative persona believed about him, presented by the District." Moreover, she claims that to "receive placement in the least restrictive environment that is appropriate for [his] needs and education, the Student should not have to waive his HIPPA rights."

To the extent she argues that any information from providers was submitted to the District during re-evaluations, Parent appears to misunderstand the purpose of discovery. Moreover I addressed her arguments about privilege in my July 20th Ruling.

In addition, Parent requests that the undersigned Hearing Officer "[r]efute all claims from the District regarding non-compliance with the production of documents, and treat all current and future motions to compel documents and discoveries, with documented responses, UNLESS the District communicates with the Plaintiff or his Advocate regarding a request for specific documents/answers/etc. that the District believes are being withheld." Though her request is difficult to comprehend, it appears that Parent is arguing that the District has not been clear about what documents it is missing, and is utilizing discovery as a method of harassment and to delay the hearing. Her final request, in fact, is that the undersigned Hearing Officer deny "all District's motions to delay and/or continue hearing if motions to subpoena are allowed."

As Parent filed her Cross Motion and Memorandum on August 24, 2017, the District's opportunity to respond has not yet expired. However, because I find no merit to Parent's arguments, I need not wait until the District has filed its response.

Parent's Motion Cross Motion for Sanction and her Motion to Compel are hereby DENIED.

CONCLUSION

For the reasons above, the District's Motion to Dismiss is DENIED, and its Motion for Rulings and Sanctions is ALLOWED in part and DENIED in part. Parent's Cross- Motion for Sanctions and Motion to Compel is DENIED. Parent's Motion to Enter Protective Orders in ALLOWED in part and DENIED in part.

ORDER

All handwritten notes and impressions created by Advocate Julliana Jennings in anticipation of the instant litigation are protected from discovery.²³ To the extent any other documents exist responsive to the District's first and second set of discovery requests, including email

²³ Should the District wish to challenge this Protective Order, it may do so by close of business on September 6, 2017.

communication between Parent and/or Student and their advocate not included on the Work Product and Communication Log, these documents must be submitted to the District as soon as possible, and no later than close of business on September 29, 2017.

The BSEA Scheduling Coordinator will contact the parties within five (5) business days of the date below to schedule new hearing dates. Should either party fail to provide the BSEA Scheduling Coordinator with reasonable availability for hearing options, the Hearing will be scheduled without that party's input.

Exhibits and witness lists will be due fifteen (15) business days in advance of the Hearing. Any documents not produced at or before that deadline, and any testimony regarding those documents, will not be permitted into evidence, absent a finding that to do so would not prejudice either party.

By the Hearing Officer,

Amy Reichbach

Dated: August 29, 2017